No. 482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 482

BURGESS-NORTON MFG. CO.,
Appellant,

vs.

RICHARD J. LYONS, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Pursuant to paragraph 3 of Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant submits this brief in opposition to appellee's motion to dismiss the appeal. Appellant submits that the questions presented by this appeal, as noted on page 3 of its jurisdictional statement, are substantial.

The Equal Protection Issues Are Substantial.

In our jurisdictional statement, we demonstrated that the Illinois Use Tax Act creates an arbitrary and unreasonable classification in violation of the equal protection clause of the Fourteenth Amendment. It taxes purchasers from persons engaged in the business of retailing for the use

of the property they purchase. It does not tax purchasers from persons deemed in service occupations. Yet in many instances the taxed and the tax free purchase identical property capable of identical uses. For example, those who buy ready-to-wear clothes subject to alterations are taxed, those who buy tailor-made clothes are not; those who buy machinery not produced to their special order are taxed, those who buy machinery produced to their special order are not taxed.

The classification is based upon differences between sellers who are not taxed, not between purchasers some of whom are. There are in fact no material differences between the purchasers who are taxed and those who are not. There being no differences, there can be no question of relating differences to a legislative purpose, and, thus, no justification for the discrimination under the equal protection clause. This point was made at pages 16 and 17 of our jurisdictional statement. Appellees apparently have no answer and have offered none.

Ignoring this argument, appellees extend only one apology for the patent discrimination: that similar distinctions are made in the Retailers' Occupation Tax Act and that the Illinois Use Tax Act "complements" that act. We pointed out in our jurisdictional statement that the purported justification is without merit. Appellee's arguments to the contrary ring hollow.

The Illinois Supreme Court admitted that if the "complement" defense failed, the uniformity requirement of the Illinois Constitution would be violated[1] and, thereby, further admitted that there was no other conceivable basis upon which the classification could be sustained. There is

1. The Court stated: "The argument would, we think be persuasive if the use tax stood alone, for so far as use by the purchaser is concerned there is no distinction between a tailor made suit of clothes, for example, and one purchased at retail.", Jurisdictional Statement, p. 47.

no difference between the standard of classification required by the uniformity provisions of the Illinois Constitution and that required by the equal protection clause of the Fourteenth Amendment, *Ohio River & W. R. Co.* v. *Dilley*, 232 U. S. 576, 590; *Lake Superior Consol. Iron Mines* v. *Lord*, 271 U. S. 577, 581; *The People* v. *St. Louis Bridge Co.*, 357 Ill. 245, 253. Thus the court below admitted that if the "complement" defense failed, as it does, appellant would be denied equal protection of the laws.

We urged in our jurisdictional statement that the Illinois Use Tax Act effectively repeals the Retailers' Occupation Tax Act and, thus, can not be said to "complement" it. Despite the fiction that retailers pocket use tax which they collect and remit the occupation tax imposed upon them, the evident fact is that the use tax is in each instance paid into the state treasury, and the retailers' tax is never paid into the state treasury. Practically, therefore, the Retailers' Occupation Tax Act is a nullity as a taxing statute. It is thus nonsensical to suggest that the discriminations of the Illinois Use Tax Act are to be justified on the ground that it "complements" the retailers' act.

Appellees answer that the use tax, when collected by retailers obliged to remit the occupation tax, is not paid into the state treasury but is retained by the retailers. This argument emphasizes form and ignores substance.

Appellees also point to cross-references in the Use Tax Act to the Retailers' Occupation Tax Act, and to recent amendments to the latter act as evidence of a lack of intention on the part of the legislature to repeal the retailers' act. This argument misses the point. The question is not what the legislature intended to do, but what it did. By enacting the Use Tax Act the legislature rendered the Retailers' Occupation Tax Act a nullity as a taxing statute. Since no tax is practically exacted by the latter act, it

cannot be said that the retailers' act taxes part of a whole, and the Use Tax Act the remainder. Thus, it cannot be said that the two acts are complementary.

Even assuming that the retailers' tax is paid into the state treasury, and the use tax collected is retained by the retailers, the two acts are still not complementary in any sense that relieves the Use Tax Act of its discriminatory character. As we noted in our jurisdictional statement, in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, the Washington use tax was not deemed discriminatory as to interstate commerce because those who purchased in intrastate commerce were subject to the sales tax. To describe the two taxes as "complementary" was both logical and correct. But here the discrimination remains whether or not the Use Tax Act and Retailers' Occupation Tax Act are considered together. While appellees seek much support in the decision of this Court in the *Henneford* case, they do not deny the validity of this contention.

Appellees heavily stress the purpose of the Use Tax Act. This purpose, they say, was to protect Illinois merchants against competition with out-of-state sellers not subject to the retailers' tax, and to produce revenue for the State that would otherwise be lost. This purpose was achieved by taxing persons buying property outside Illinois for use in Illinois. That such was the purpose of the act, and that the purpose was achieved, we did not deny in our jurisdictional statement and do not deny now. But the discrimination of the Use Tax Act is in no way related to such a purpose. As we pointed out in our jurisdictional statement, the purpose would have been achieved even if purchasers from those engaged in service occupations had also been taxed, and the discrimination had thereby been removed.

It is no answer for appellees to suggest that the purpose would also have been achieved if users who produce

their own property, such as farmers, had also been taxed. Appellant is not complaining of the failure of the act to tax farmers. There is a substantial difference between purchasers and producers. Appellant is complaining of the failure to tax purchasers from servicemen, who buy identical property and put it to identical uses. This, we say, is discriminatory, and this discrimination is unrelatable to the legislative purpose emphasized by appellees.

Nor is it any answer for appellees to state, as they do on page 17 of their motion to dismiss, that the discrimination is justified "because the purpose under discussion is fully accomplished without bringing new kinds of local transactions within the tax base." This does not relate the discrimination to the broad purposes under discussion but only a purpose of making the same exemptions in the two acts.

Nor is it any answer that the other use tax acts which have been before this Court had similar purposes and were sustained. Those cases (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335; *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373; but see *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340) sustained the principle of use tax legislation under the commerce clause. No such discrimination as that presented by the Illinois Use Tax Act was involved. We do not claim that the Use Tax Act violates the commerce clause. We do assert that its discriminatory character deprives appellant of the equal protection of the laws.

The only purpose to which the discrimination is relatable is that of making the same exemptions under the Use Tax Act as are made by the Retailers' Occupation Tax Act. This is a purpose predicated on form, not on substance. We do not believe that taxpayers should be denied equal

protection of the laws in the interest of form, rather than substance. Furthermore, such a purpose ignores the fact that the Retailers' Occupation Tax is a tax on retailers while the Use Tax is imposed upon purchasers. Certainly it is arbitrary and unreasonable to apply the same classification tests to different groups, retailers and purchasers, when such application results in discrimination against many purchasers.

Moreover, as we noted in our jurisdictional statement, the Illinois legislature did not even consistently adhere to its purpose of not broadening the base of the Retailers' Occupation Tax Act. The Use Tax Act imposes a tax on the value of trade-ins; the retailers' tax does not. Certainly if discrimination is to be condoned in the interest of one act not broadening the base of another, consistency should be required. Appellees devote four pages (21-24) of their Motion to Dismiss to proof that the different treatment of trade-ins is not discriminatory. We do not deny that now, and did not do so in our jurisdictional statement. The discussion is irrelevant.

In support of the purpose of making the exemptions the same under the Use Tax Act and the Retailers' Occupation Tax Act, appellees urge that this is what other use tax acts do, and, therefore, Illinois should be able to do the same thing. What other states do is, of course, essentially irrelevant to the validity of what Illinois has done. But it should be said that other states have had no difficulty in avoiding the discrimination resulting from the classification made by the Illinois Use Tax Act. The Michigan Use Tax Act, for instance, though it complements a retailers' occupation tax act,[2] taxes not only purchasers from persons

2. C. C. H. Michigan State Tax Reporter, ¶ 60-001.

engaged in the business of selling tangible personal property, but purchasers from servicemen as well.[3]

In *Walters* v. *City of St. Louis*, 347 U. S. 231, this Court stated (p. 237):

> "The power of the State to classify according to occupation for the purpose of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.'"

The classification of the Use Tax Act does not rest on differences between the taxed and the tax free. It is wholly arbitrary and unreasonable. The decision of the court below is, accordingly, unsound. We agree with Justice Davis when he said of that decision, in dissenting.[4]

> "The Court's decision has effectively removed many of the basic constitutional limitations on the taxing power. If this is to be done, it should be done by a well considered constitutional amendment and not by fiat of this court."

With reference to the discrimination of the Use Tax Act resulting from its failure to provide for refunds to purchasers who return the property they purchase but who paid the use tax in the first instance to the Department of Revenue, that part of Section 10 quoted by appellees does not eliminate the discrimination. This appellees once admitted, for they stated in their answering brief[5] in *Turner*

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3. The exemption contained in the original Michigan Use Tax Act of "property purchased from a seller who is not engaged in the business of selling tangible personal property", § 4(e), Public Act 94, 1937, was deleted by the amendment of Public Act 273, 1949.

4. Jurisdictional Statement, p. 55.

5. R. 72.

v. *Wright*, 11 Ill. 2d 161, 142 N. E. 2d 84 filed in the Illinois Supreme Court at page 12:

> "The refunds contemplated by the Act are contingent upon an Illinois retailer's obtaining a refund. This is precisely the type of refund that is provided for by the Retailers' Occupation Tax Act."

The Due Process Issue Is Substantial.

As we have stated, while the Use Tax Act in form authorizes retailers to retain the use tax which they collect to the extent they are remitting retailers' occupation tax on the same transaction, in practical effect the use tax reaches the state treasury, and the retailers' tax does not. Practically, therefore, the Retailers' Occupation Tax Act is rendered a nullity as a taxing statute. It is then idle for appellees to assert that the discriminatory character of the Use Tax Act is to be justified by its relationship to the occupation tax act

While appellees implicitly admit the conclusion, if the premise is correct, by not denying it, they do not accept the premise. They insist that the use tax is in fact retained by the retailers who collect it.[6] If they are right in this, then, as we urged in our jurisdictional statement, use taxpayers are forced to relinquish their property for a private purpose in violation of due process requirements.

Appellees argue that the offset provision was not intended to profit anyone, but was aimed simply at preventing two taxes from reaching the state treasury. Nonetheless, the salient fact is that if the money is in fact retained by the retailers, the provision does work to the financial benefit of the retailers. Comparably, in *Loan Association* v. *Topeka*, 87 U. S. (20 Wall) 655, 665, it was argued that

6. Though on page 19 of their Motion to Dismiss filed in *Turner* v. *Wright*, No. 405 in this Court, appellees appear to argue the contrary.

the benefit conferred, by taxation of private individuals, upon private manufacturers was intended to benefit the public at large. Yet the argument was rejected, and the taxation held to be for a private purpose in violation of due process requirements. The fallacy of appellees' reasoning becomes graphic when it is considered that the alleged primary purpose of the offset provision would have been just as well accomplished if the act had directed retailers to distribute the funds collected among the families of state officials.

Appellees also urge that the offset provision was dictated by the peculiarities of Illinois law, and is, therefore, justified. It would be no comfort to the Illinois taxpayer who must give up his own funds for some other private person's benefit to know he had to do so because of peculiarities of Illinois law. Clearly, there is no justification for depriving persons of their fundamental rights in deference to such flimsy necessities.

Conclusion.

The motion to dismiss should be denied, and this Court should note probable jurisdiction of this appeal because of the substantial federal questions involved.

Respectfully submitted,

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